Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and John Moe, as Sheriff of Missoula County, Montana, STATE OF MONTANA,

Appellant,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

Appeal from the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Appellant, pursuant to United States Supreme Court Rules 13 (2) and 15, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question and should exercise such jurisdiction in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit on November 19, 1976 decided and filed its written opinion, which is not yet reported. A copy of the opinion is attached to this Jurisdictional Statement as Appendix A. The above opinion reversed and remanded the prior judgment of the District Court, the opinion of which is reported in 406 F. Supp. 430 (1975), and attached to this statement as Appendix B.

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JURISDICTION

After conviction on a charge of Obtaining Money by False Pretenses, Bretz and Cline filed Petitions for Writs of Habeas Corpus in the United States District Court for the District of Montana, Billings Division. On December 31, 1975 the Honorable James F. Battin denied the petitions. Notices of Appeal to the Ninth Circuit Court of Appeals were filed by Bretz and Cline in January 1976. That Court, on appeal, reversed the decision of the District Court.

The appeal herein is from a final judgment decided and filed by the United States Court of Appeals for the Ninth Circuit on November 19, 1976, which held that a second prosecution brought against appellees herein violated the double jeopardy clause of the Fifth Amendment to the United States Constitution. The Court concluded that federal law, not state statute, determined when jeopardy attaches and that therefore defendants-appellees had twice been placed in jeopardy despite the fact that under Montana law, Section 95-1711 (3) (d), Revised Codes of Montana, 1947, jeopardy did not attach in the initial prosecution.

The Supreme Court of the United States has jurisdiction to review by direct appeal the opinion complained of by the provisions of 28 USC Sec. 1254 (2).

The following decisions sustain the jurisdiction of the Supreme Court to review the opinion on direct appeal in this case. *Dutton v. Evans,* 400 U. S. 74, 76 (1970); *United Gas Pipe Line Company v. Ideal Cement Company,* 369 U. S. 134 (1961); *Watson v. Employers Liability Assurance Corp.,* 348 U. S. 66 (1954), rehearing denied 348 U. S. 921 (1954).

The paragraph of the statute of the State of Montana found to be in violation of the Fifth Amendment is:

Section 95-1711 (3) (d), Revised Codes of Montana, 1947.

> "The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:
>
> (i) the defendant consents to the termination or waives his right to object to the termination; or
>
> (ii) the trial court, in the exercise of its discretion, finds that the termination is necessary because:
>
> (A) it is physically impossible to proceed with the trial in conformity with law; or

(B) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(C) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state; or

(D) the jury is unable to agree upon a verdict; or

(E) false statements of a juror or voir dire prevent a fair trial."

The entire text of this statute is contained in Appendix D.

Notice of Appeal was filed with the Ninth Circuit Court of Appeals on December 13, 1976, a copy of which is contained in Appendix C.

QUESTIONS PRESENTED

1. Can Montana determine by statute that jeopardy attaches in a trial when the first witness is sworn, or must it conform to the Federal Procedural Rules which establish the swearing of the jury as the point at which jeopardy attaches?

2. Or, is Section 95-1711 of the Revised Codes of Montana, 1947, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution?

3. Assuming that this Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of "manifest necessity" nevertheless require that a trial be held?

STATEMENT OF THE CASE

The Information No. 3921 in this matter was filed on October 3, 1974, in Lewis and Clark County, State of Montana, charging Bretz and Cline with the commission of nine felonies. On March 13, 1975, a jury was empanelled and sworn; no witnesses were sworn. The trial court then dismissed three counts for failure to state an offense, in that due to a typographical error, the date of commission read "1974" rather than "1973". (And, unfortunately, the Montana Criminal Code of 1973 took effect January 1, 1974, i. e., the charging statute was repealed on that date.) The state filed and the State District Court granted a motion to dismiss the remaining counts on April 4, 1975, before any witnesses were sworn; a second Information, No. 3963, alleging the commission of two felonies by Bretz and Cline was filed on the same day. Defendants' motions to dismiss on the grounds of double jeopardy were filed on April 25, 1975, and the State District Court denied them on May 1, 1975. Bretz filed a Petition for Habeas Corpus with the Supreme Court of Montana alleging double jeopardy. This was denied by that Court on July 23, 1975. *Bretz v. Sheriff*, (1975) 539 P. 2d 1191. On September 2, 1975, the Supreme Court denied a rehearing. A trial com-

menced in the State District Court of the First Judicial District on June 16, 1975, and on July 2, 1975 Bretz and Cline were found guilty of Obtaining Money by False Pretenses—one of the same counts that had been dismissed in the earlier proceeding by the trial court because of a typographical error.

Bretz and Cline filed Petitions for Writs of Habeas Corpus in the United States District Court for the District of Montana, Billings Division, and the matters were ordered consolidated with that of a similar petition filed by Clancy Cunningham. On December 31, 1975, the Honorable James F. Battin denied the petitions. *Cunningham, et al. v. Montana,* 406 F. Supp. 430 (D. Mt., 1975).

Notices of Appeal to the Ninth Circuit Court of Appeals were filed by Bretz and Cline on January 7 and 9, 1976 respectively. The matters were again consolidated. In their opinion filed November 19, 1976, the Court reversed the lower court ruling that the state statute did not control when jeopardy attached in the first proceeding and that under federal law the defendants had twice been placed in jeopardy in violation of the Fifth Amendment. The Court went on to reverse the other part of the lower court's decision which held that even if jeopardy had attached the doctrine of "manifest necessity" required that the trial be held. On December 13, 1976 the appellants herein duly filed their Notice of Appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellants submit that the judgment below presents substantial questions warranting the acceptance of this action. The Ninth Circuit Court of Appeals' opinion rules that it is constitutionally impermissible for the separate states to establish rules governing when jeopardy attaches which vary in any degree past the time established in the Federal Rules of Criminal Procedure. The Montana statute in question provides that jeopardy attaches when the first witness is sworn as opposed to the federal rule which uses the point at which the jury is sworn. Substantively speaking, the two rules are of little or no difference.

This Court has not previously addressed the issue now presented. There is no question but that Fifth Amendment rights apply to the states as incorporated in the Fourteenth Amendment. *Benton v. Maryland,* (1969) 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056. However, *Benton* did not hold that all states, Montana included, must follow the identical *procedures* as those set forth for use in federal courts in order to protect Fifth Amendment *substantive* rights in state courts.

Likewise, later Supreme Court cases have not had occasion to address themselves to this issue. *Serfass v. United States,* (1975) 420 U. S. 377, 43 L. Ed. 2d 265 concerned a *federal* district court—there were no state proceedings involved and the Court never addressed itself to the issue presently before this Court. *Downum v. U. S.,* (1963) 372 U. S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 did involve a question of double jeopardy arising after a jury was empaneled and sworn and before the first witness was

called. But *Downum* went to the question of "manifest necessity", for every case arising in Federal Courts assumes without question, that the Federal rule applies, i. e., jeopardy "attaches" after the jury is empaneled and sworn. Since *Downum* was a case where a jury had been sworn, but no witness called, *Downum* is cited for the authority for the rule. But *Downum* did not question the rule.

Serfass, supra, gets closer to the point, in an effort to determine if jeopardy had attached *before* a jury had been called,

> "As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy'. See *United States v. Jorn,* supra, at 480. In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. *Downum v. United States,* 372 U. S. 734 (1963); *Illinois v. Somerville,* 410 U. S. 458 (1973). In a nonjury trial, jeopardy attaches when the court begins to hear evidence. *McCarthy v. Zerbst,* 85 F. 2d 640, 642 (CA 10 1936). See *Wade v. Hunter,* 336 U. S. 684, 688 (1949). The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge'. *United States v. Jorn,* supra, at 479.",

at p. 388. Significantly, jeopardy attaches, in a non-jury case, *after* the first witness is sworn.

In *U. S. v. Jorn* (1970), 400 U. S. 470, the Court held that jeopardy had already attached in a *Federal District Court* at a point in time after a witness had *already testified.* Again there was no mention of anything relevant to the issue presently before this Court.

In *Breed v. Jones* (1975), 44 L. Ed. 2d 346, the United States Supreme Court did not render any blanket holding to the effect that a state could not decide at what point jeopardy attached. The Court addressed itself to the issue of whether a juvenile court adjudication constituted a "trial"—thereby establishing double jeopardy due to a subsequent adult trial for the same offense. The Court addressed itself primarily to the unique nature of juvenile proceedings, and to the legal rights of juveniles, and concluded that such a proceeding was, in fact, like a trial—and jeopardy attached. Nowhere in the opinion does the court categorically assert that a state cannot determine at what point a trial commences. More interestingly, nowhere does the Court even attempt to impose any federal procedural rule upon the California juvenile courts. The sole concern in *Breed,* as it is in the instant case, is not whether federal *procedures* were followed, but: were federally-guaranteed *rights* violated. In *Breed,* a young man was, in fact, tried twice for the same offense and found culpable both times; in the instant case, Appellant was tried but one time.

Illinois v. Somerville, (1973), 410 U. S. 184 concerned a state trial in circumstances where jeopardy had clearly attached under a state rule which was the same as the federal rule.

In the case of *State v. Padilla,* 483 P. 2d 549 (Ariz. 1971), cert. den., 404 U. S. 1049 (1972), the exact issue involved here was directly addressed by the Arizona Supreme Court. They ruled in accordance with Montana's

position on this appeal. However, at that time this Court denied certiorari and thus the question remains without Supreme Court resolution.

With respect to other Amendments within the Bill of Rights, this Court has been careful to distinguish between *substantive rights* and *procedures*. For instance, in *Apodaca v. Oregon*, 406 U. S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972) and *Johnson v. Louisiana*, 406 U. S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972), this Court ruled that it was constitutionally permissible for the states to require less than jury unanimity for a conviction notwithstanding the fact that federal procedure requires a unanimous verdict.

Similarily, this Court has ruled that a state can provide for juries of less than twelve persons—again in contravention of existing federal rules. *Williams v. Florida*, 399 U. S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

A question to be resolved then is whether the Fifth Amendment application to the separate states requires them to adopt federal procedures and that it is not enough that the state procedure preserves the constitutional objectives. From a practical standpoint a defendant receives no less protection under Montana's statute, and similar statutes in other states, than he would under the Federal rule since the swearing of the jury and the swearing of the first witness occur at nearly the same time.

It is submitted that the decision of the Ninth Circuit here being appealed represents an unprecedented and unnecessary restriction on the rights of the State of Montana to adopt criminal procedures at variance with federal

procedures as long as those procedures preserve the applicable constitutional objectives.

CONCLUSION

It is submitted that the questions raised herein are of vital importance, not only to Montana, but to many of the separate states. The questions submitted are substantial and present to this court far reaching issues of the most vital public importance that must be answered.

DATED: February 15, 1977.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1572

L. R. BRETZ,

Petitioner-Appellant,

vs.

ROGER CRIST, etc., et al.,

Respondent-Appellee.

No. 76-1169

OPINION

MERREL CLINE,

Petitioner-Appellant,

vs.

THE STATE OF MONTANA, etc., et al.,

Respondent-Appellee.

[November 18, 1976]

On Appeal from the Federal District Court, District of Montana, Billings Division

Before: CHAMBERS, Chief Judge, TUTTLE* and KILKENNY, Circuit Judges.

TUTTLE, Circuit Judge:

The tension between federalism and the doctrine of selective incorporation of Bill of Rights guarantees via the Fourteenth Amendment inevitably generates appeals such

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* Honorable Elbert P. Tuttle, Senior Judge, U. S. Court of Appeals, Fifth Circuit, sitting by designation.

as this. Appellants contend that a second prosecution brought against them by the State of Montana violated the double jeopardy clause of the Fifth Amendment as applied to the states through the due process clause of the Fourteenth Amendment. In denying their petition for habeas corpus, following conviction at the second trial, the United States District Court for the District of Montana agreed with the state that state, not federal, law determines when jeopardy attaches and therefore under the controlling Montana statute appellants had not been put in jeopardy by the first prosecution; and, in the alternative, that federal standards for re-prosecution following a declaration of mistrial had been met. *Cunningham v. District Court,* 406 F. Supp. 430, 432-434 (D. Mont. 1975) (consolidated case).

I. A TALE OF TWO TRIALS

The evidence at the trial would justify finding that appellants Bretz and Cline concocted a fraudulent scheme to obtain workmen's compensation payments as beneficiaries of one Wampole, deceased. The plan's particulars were not illuminated on appeal, but it appears that appellants filed a claim with the Montana Workmen's Compensation Division, alleging that Wampole was an employee of Courtesy Mobile Home Transporting, Inc.; that he suffered a fatal injury in the course of his employment; and that they were entitled to benefits on his behalf. Appellants prepared and submitted three different documents to the Workmen's Compensation Division: a "Claim for Compensation;" an "Employer's First Report of Occupational Injury or Disease;" and a "Petition for Compromise Settlement." Based on these documents, the Division paid a settlement of $5400 to the appellants.

A. *The Charges.*

Claiming that Wampole had never been employed by Courtesy, and had not been fatally injured in the course of his alleged employment, the state filed a nine-count information on October 3, 1974. The state leveled the following charges against the appellants:

> (1) Count I contended that the entire scheme constituted grand larceny in violation of Rev. Code of Montana § 94-2701 (1) (1948), and specified that the offending conduct occurred between January 13, 1973 and February 19, 1974.
>
> (2) Count II also applied to the entire scheme, and maintained that appellants committed the crime of obtaining money and property by false pretenses in violation of Rev. Code of Montana § 94-1805 (1947). Due to a typographical error, however, the information specified that the offending conduct occurred between January 13, *1974* and February 19, 1974.
>
> (3) Counts III through VIII fragmented[1] appellants' conduct into three instances of preparing false evidence in violation of Rev. Code of Montana § 94-1703 (1947) and three instances of offering false evidence in violation of Rev. Code of Montana § 94-1701 (1947). Each of the three documents submitted by appellants to the Division anchored a pair of offenses. Thus, the "Claim for Compensation" was the basis for charges of preparing false evidence and offering false evidence

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1 "There is probably some correlation between the slighting of [the interest of society in preventing the guilty from going unpunished] and the development of rules allowing a liberal splitting of offenses . . . when one slip may result in total immunity from prosecution . . . the temptation to multiply the number of bites at the apple may become irresistible." Note, **Double Jeopardy: The Reprosecution Problem,** 77 Harv. L. Rev. 1272, 1274 (1964); **see** Johnson v. Commonwealth, 201 Ky. 314, 256 S. W. 338 (1923) (each of 75 hands of poker a separate offense).

between the dates of February 5, 1973 and February 13, 1973 (Counts III and IV); the "Employer's First Report" was the basis for similar charges of criminal conduct during the period March 19, 1973 to March 22, 1973 (Counts V and VI); and the "Petition for Compromise Settlement" was the basis for similar charges of criminal conduct during the period January 30, 1974 to February 1, 1974 (Counts VII and VIII).

(4) Count IX returned to the entire scheme and alleged that the appellants' conduct amounted to presenting false proofs upon a policy of insurance in violation of REV. CODE OF MONTANA § 94-2202 (1947), the offending activity supposedly having occurred between January 13, 1973 and February 19, 1974.

B. *The First Prosecution*

The following facts are conclusively established by the record. On March 10, 1975, counsel for the state and for appellants answered ready in the state trial court. On March 12, 1975, before voir dire had been completed, the trial court granted the state's motion to dismiss Count IX of the information (presenting false proofs upon a policy of insurance). On March 13, 1975, a jury was impaneled and sworn. Before opening statements and before any evidence had been offered, the jury was excused as defense counsel presented several motions to the court. The most important of these motions sought to restrict the state's evidence to the allegations of the information. This tactical stroke was aimed at Count II (obtaining money and property by false pretenses): the information mistakenly charged that the conduct constituting this offense had occurred between January 13, *1974* and February 19, 1974, but the relevant statutory provision, REV. CODE OF MONTANA § 94-1805 (1947), had been repealed effective January 1, 1974.

The state resisted this attempt to excise Count II from its case, and on March 21, 1975, moved to amend Count II to correct the typographical error. On March 24, 1974, the trial court denied this motion and *sua sponte* dismissed Count II for failing to state an offense.[2] After the Montana Supreme Court declined to grant the state's petition for a writ of supervisory control, the state returned to the trial court and moved to dismiss the remaining counts in order to "file a new and different information." The trial court granted the motion for this "limited purpose" and discharged the jury on April 4, 1975.

C. *The Second Prosecution*

On the same day that the trial court dismissed the first information, the state filed a second, two-count information. Count I accused the appellants of grand larceny, and tracked the language of Count I of the original information. Count II charged them with obtaining money and property by false pretenses, and corrected the typographical error that had flawed the original information. A new jury was impaneled, appellants' motion to dismiss on grounds that the prosecution placed them twice in jeopardy was denied, and appellants were found guilty of obtaining money and property by false pretenses. After exhausting available state postconviction remedies, appel-

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2 The district court's finding that Count II was dismissed at the defendant's request, 406 F. Supp. at 431, was clearly erroneous. The trial court acted sua sponte.

lants sought and were denied habeas corpus relief by the district court.

II. ATTACHMENT OF JEOPARDY

Before 1969, the Supreme Court employed different criteria to test the constitutional permissibility of reprosecutions by state and federal authorities. Even though double state trials might run afoul of Fifth Amendment barriers to federal reprosecutions, the Fourteenth Amendment was thought to pose no constitutional obstacle to state retrials unless the proceedings exposed the accused to "that kind of double jeopardy [which creates] a hardship so acute and shocking that our polity will not endure it." *Palko v. Connecticut*, 302 U. S. 319, 328 (1937).[3] In *Benton v. Maryland*, 395 U. S. 784, 794 (1969), however, the Supreme Court eschewed *Palko's* "approach to basic constitutional rights," and found "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." The question in *Benton* was whether an accused who successfully appeals a conviction may be reprosecuted not only for the offense of which he was convicted, *e. g., North Carolina v. Pearce*, 395 U. S. 711, 719-20 (1969) (no Fifth Amendment bar to state retrial on same charge when defendant appeals and wins reversal), but also for an offense of which he was acquitted at the first trial. Relying on federal precedents, the *Benton* court held that the acquittal could not be reopened, and based its derivative holding on the proposition that "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . the same constitutional standards apply against both the State and Federal Governments." 395 U. S. at 795.

3 **Compare** Brock v. North Carolina, 344 U. S. 424 (1953) (retrial after mistrial declared to allow state to secure testimony of witness claiming privilege against self incrimination did not violate Fourteenth Amendment), **with** Gori v. United States, 376 U. S. 364, 369 (1961) (dictum) (declaration of mistrial to afford prosecution more favorable opportunity to convict violates Fifth Amendment); **and compare** Hoag v. New Jersey, 356 U. S. 464, 471 (dictum) (criminal collateral estoppel not required by Fourteenth Amendment), **with** Ashe v. Swenson, 397 U. S. 436, 445 (1970) (collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy)."

A. *A Question of Lawmaking Competence*

An arithmetical as well as constitutional precondition to being "subject for the same offense to be twice put in jeopardy of life or limb," U. S. Const. amend. v, is to be once put in jeopardy. Hence the theory of attachment of jeopardy, admittedly an attempt at reification, but nevertheless serving to signify that point in the state's efforts to secure a conviction when the interests protected by the double jeopardy clause are sufficiently implicated to warrant barring a second prosecution absent special countervailing considerations. If the state rule—that jeopardy does not attach until "after the first witness is sworn," Rev. Code of Montana, § 95-1711 (3) (d) (1947)—is controlling, then petitioners were never put in jeopardy by the first prosecution and their second trial *a fortiori* could not have contravened the constitutional command. *See Alexander v. Fogliani*, 375 F. 2d 733, 734 (9th Cir. 1967) (no double jeopardy violation where, because jury had not been impaneled, jeopardy could not have attached). But

if the federal rule—that jeopardy attaches when a jury is impaneled and sworn, *e. g., Downum v. United States,* 372 U. S. 734, 735-36 (1963)—is of constitutional dimension, then jeopardy attached at the first trial and unless the mistrial declaration was consonant with the "manifest necessity" doctrine, *see* Part III *infra,* the second trial was constitutionally impermissible. The threshold question is thus whether the federal attachment of jeopardy rule is a product of constitutional exegesis or simply a nonconstitutional consequence of the Supreme Court's supervisory power over federal courts and federal officials.

We reject at the outset the notion that while the double jeopardy clause constrains reprosecutions by the states, it countenances different constitutional applications in state and federal courts. To be sure, this double-barreled incorporation doctrine can claim its supporters,[4] but it has never commanded a majority of the Supreme Court. Each time the due process clause of the Fourteenth Amendment has been interpreted to encompass a particular guarantee of the Bill of Rights, the Court has explicitly reaffirmed the proposition that the same constitutional norms are to be employed in assessing the conduct of state and federal authorities. *E. g., Ker v. California,* 374 U. S. 23, 33 (1963) ("the standard of reasonableness is the same under the Fourth and Fourteenth Amendments"); *Malloy v. Hogan,* 378 U. S. 1, 11 (1964) ("the same standards must determine whether an accused's silence in either a federal or state proceeding is justified"); *Pointer v. Texas,* 389 U. S. 400, 406 (1965) (Sixth Amendment confrontation clause "is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment'") (citation omitted). Read in the context of these and other landmark incorporation decisions, *Benton's* declaration that "the same constitutional [double jeopardy] standards apply against both the State and Federal governments," *Benton v. Maryland,* 395 U. S. 784, 795 (1969), and its determination that "the validity of [state] conviction[s] must be judged . . . under this Court's interpretation of the Fifth Amendment double jeopardy provision," 395 U. S. at 796, compel the conclusion that if the federal attachment of jeopardy rule is constitutionally mandated in federal courts, no different rule may be followed by state courts.

Neither the Court's application of the exclusionary rule nor the jury trial cases embarrass the Supreme Court's position that the coverage of selectively incorporated provisions of the Bill of Rights must be coextensive in state and federal tribunals. It is true that although the Fourth Amendment's prohibition of unreasonable searches and seizures was made applicable to the states in *Wolf v. Colorado,* 338 U. S. 25 (1949), the Supreme Court delayed full enforcement of the federal exclusionary rule, *see Weeks v. United States,* 232 U. S. 383 (1914), against the states for another twelve years. *See Mapp v. Ohio,* 367 U. S. 643 (1961); *cf. Elkins v. United States,* 364 U. S. 206 (1960) (evidence illegally obtained by state officials may not be used in federal prosecutions). Recent Supreme

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4 See, e. g., Ludwig v. Massachusetts, 44 U. S. L. W. 5173, 5177 (U. S. June 30, 1976) (Powell J., concurring) (jury trial); Baldwin v. New York, 399 U. S. 66, 76-77 (1976) (Burger, C. J., dissenting) (same); Duncan v. Louisiana, 391 U. S. 145, 213 (1968) (Fortas, J., concurring) (same).

Court decisions, however, demonstrate that the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," *United States v. Calandra,* 414 U. S. 338, 348 (1974); *accord, United States v. Peltier,* 422 U. S. 531, 538-39 (1975). The Court's holding in *Stone v. Powell,* 44 U. S. L. W. 5313 (U. S. July 6, 1976), that a state prisoner afforded an adequate opportunity to contest the admission of illegally seized evidence at his state trial is not entitled to federal habeas corpus consideration of such a claim, confirms that the exclusionary rule, while constitutionally inspired, is not constitutionally required. Thus the hiatus between *Wolf* and *Mapp* gives us no pause: because the exclusionary rule is not constitutionally required—that is, it forms part of "a substructure of substantive, procedural and remedial rules . . . a constitutional common law subject to amendment, modification, or even reversal by Congress"[5]—its belated application to the states exposes no flaw in the Court's selective incorporation doctrine.

The state misreads *Williams v. Florida,* 399 U. S. 78 (1970), and *Apodaca v. Oregon,* 406 U. S. 404 (1972), as encouraging respect for state "procedural" rules that leave the "substance" of federal constitutional rights intact. *Williams* held that a state need not provide a 12-person jury in order to comply with the jury trial requirements of the Sixth Amendment. In *Apodaca,* a plurality of four Jus-

5 Monaghan, **The Supreme Court, 1974 Term—Foreword: Constitutional Common Law.** 89 Harv. L. Rev. 1, 2-3 (1975).

tices maintained that when a state dispenses with the unanimity requirement, it does not scuttle the *Duncan*-incorporated jury trial guarantee. The crucial point, however, is that the *Williams* majority and the *Apodaca* plurality treated the 12-person and unanimity requirements, respectively, as non-constitutional rules in federal as well as state courts.[6] That is, neither requirement was termed a *sine qua non* of the jury trial right protected by the Sixth Amendment in federal courts, and thus neither—under established incorporation doctrine—was found to be indispensable in state proceedings.

B. *Constitutional Status of the Attachment of Jeopardy Rule*

The attachment of jeopardy rule performs a crucial service in double jeopardy jurisprudence, but its office is confined to the mistrial context. When the question is whether an accused is threatened with double punishment,[7] whether two trials focus on the "same offense,"[8] whether

6 Williams v. Florida, 399 U. S. 78, 79 (1970) ("the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment"); Apodaca v. Oregon, 406 U. S. 404, 406 (1972) (unanimity requirement is "not of constitutional stature").

7 See, e. g., Ex parte Lange, 85 U. S. (18 Wall.) 163 (1874).

8 See, e. g., Abbate v. United States, 359 U. S. 187 (1959) (federal government may prosecute after state has convicted defendant); Bartkus v. Illinois, 359 U. S. 121 (1959) (state may prosecute after acquittal in federal trial); Waller v. Florida, 397 U. S. 287 (1970) (state may not prosecute individual for same offense for which he has been prosecuted in municipal court); Ashe v. Swenson, 397 U. S. 436 (1970) (collateral estoppel is requirement of Fifth Amendment double jeopardy clause).

government appeal amounts to second jeopardy,[9] or whether reprosecution after dismissal[10] or defendant's successful appeal[11] constitutes double jeopardy, attachment of jeopardy at some time during a former prosecution is not controverted. The issue in these types of cases is whether the particular additional punishment or procedure is a constitutionally prohibited second run through the gantlet. Many mistrial cases require a similar analysis, *see* Part III *infra*. On this appeal, however, we confront the question whether the first proceeding put appellants in jeopardy, for the state neither maintains that the second prosecution failed to put appellants in jeopardy nor suggests that the tantalizing but firmly rejected theory of "continuing jeopardy"[12] now be embraced to unite both proceedings as only one jeopardy.

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9 **See, e. g.,** Kepner v. United States, 195 U. S. 100, 129-30 (1904) (no government appeal from verdicts or judgments of acquittal, no matter how erroneous their foundation in law or fact).

10 **See, e. g.,** United States v. Sisson, 399 U. S. 267, 288-90 (1970).

11 **See, e. g.,** United States v. Ball, 163 U. S. 662, 672 (1896).

12 Mr. Justice Holmes first advanced the continuing jeopardy theory, **see Kepner v. United States,** 195 U. S. 100, 134-35, (Holmes, J., dissenting), to justify government appeal after acquittal, but neither appeal after acquittal, nor the theory has been accepted by the Court, **see e. g.,** Green v. United States, 355 U. S. 184, 192-94 (1957); United States v. Wilson, 420 U. S. 332, 351-52 (1975). As an alternative to the untidy "waiver" theory, continuing jeopardy has served as a metaphor to explain why a defendant who appeals his conviction may be retried, **see e. g.,** Price v. Georgia, 398 U. S. 323, 326 (1970), but the Court currently deprecates both theories and finds retrial after defendant appeal to be justified by analysis of the "respective interests involved," Breed v. Jones, 421 U. S. 519, 534 (1975). For an attempt to structure a comprehensive set of double jeopardy rules around the continuing jeopardy concept, see Mayers & Yarbrough, **Bis Vexari: New Trials and Successive Prosecutions,** 74 Harv. L. Rev. 1 (1960).

Before *Downum v. United States,* 372 U. S. 735 (1963), the Supreme Court had no occasion to announce a rule governing the attachment of jeopardy, all previous mistrial cases had held that the declaration of mistrial was proper and that therefore retrial did not give rise to a cognizable double jeopardy claim, *see, e. g.,* note 27, *infra.* Leading Courts of Appeals cases did not observe an analytical distinction between situations when jeopardy attaches during the first proceeding and those in which a subsequent proceeding subjects the accused to a second jeopardy,[13] but the Supreme Court in *Downum* clearly perceived the issue as whether the facts justified retrial after a mistrial "although the jury impaneled for the first trial was discharged without reaching a verdict and without the defendant's consent." 372 U. S. at 736. Since the mistrial in *Downum* had been declared after the first jury was impaneled but before any evidence had been introduced, 372 U. S. at 741 (Clark, J., dissenting); *Downum v. United States,* 300 F. 2d 137, 139-40 (5th Cir. 1962), the case necessarily stands for the proposition that jeopardy attaches when a jury is impaneled. The Court explicitly adopted this reading of *Downum* in *Illinois v. Somerville,* 410 U. S. 458, 467-68 (1973), and *Serfass v. United States,* 420 U. S. 377, 388

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13 **Compare** Cornero v. United States, 48 F. 2d 69 (9th Cir. 1931) (holding jeopardy attaches when jury is impaneled but finding "exceptions to this general rule as to what constitutes former jeopardy") **and** Himmelfarb v. United States, 175 F. 2d 924, 932 & n. 2 (9th Cir. 1949), **cert. denied,** 338 U. S. 860 (1949) ("in numerous circumstances either the jeopardy attaching when the jury was sworn didn't count or didn't attach when the jury was sworn"), **with** Downum v. United States, 300 F. 2d 137, 139-40 (5th Cir. 1962), **rev'd,** 372 U. S. 734 (1963), (suggesting jeopardy might not attach if no evidence introduced but nevertheless requiring a "sound reason" for termination of proceedings after jury has been impaneled).

(1975). *Cf. United States v. Sisson,* 399 U. S. 267, 302-03 (1970) (statutory construction: phrase "put in jeopardy" of Criminal Appeals Act "confines the Government's right to appeal . . . to situations in which a jury has not been impaneled").[14]

We hold that the attachment of jeopardy rule applied in *Downum, Somerville* and *Serfass* is a constitutional requirement of the Fifth Amendment which is binding on the states as well as the federal government. The rule itself serves as the lynchpin for all double jeopardy jurisprudence. *Serfass v. United States,* 402 U. S. 377, 393 (1975) ("fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy"); *Illinois v. Somerville,* 418 U. S. 458, 467-68 (1973) ("the conclusion that jeopardy has attached begins . . . the inquiry. . . . Only if jeopardy has attached is a court called upon to determine whether the declaration of a mistrial" comports with the double jeopardy clause). Justice Harlan writing for the Court in *United States v. Jorn,* 400 U. S. 470 (1971),[15] clearly indicated the constitutional stature of the rule: "the conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings." 400 U. S. at 480. The Chief Justice's opinion in *United States v. Serfass,* 420 U. S. 377 (1975), buttresses our conclusion: "the

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14 **Accord,** United States v. Olsen, 504 F. 2d 1222, 1224 (9th Cir. 1974) ("Since no jury had been empaneled and sworn, jeopardy had not attached.")

15 The Chief Justice joined Justice Harlan's plurality opinion. See 400 U. S. at 487.

courts have found it useful to define a point in criminal proceedings *at which the constitutional purposes and policies are implicated* by resort to the concept of 'attachment of jeopardy,'" 420 U. S. at 388 (emphasis supplied).

The Supreme Court has consistently applied the federal attachment of jeopardy rule to state cases. In *Illinois v. Somerville,* 410 U. S. 458 (1973), the Court unhesitatingly turned to the federal rule as the first step in a two-step analysis to determine (1) when jeopardy attached and (2) whether subsequent proceedings amounted to a second jeopardy. *See* 410 U. S. at 467-68. Montana points out that the federal and state attachment of jeopardy rules in *Somerville* were identical. *See, e. g., People v. Somerville,* 88 Ill. App. 2d 212, 232 N. E. 2d 115, 117 (Ill. App. 1967), but this erroneously equates a circumstance with a dispositive factor in a Supreme Court opinion. The *Somerville* Court never mentions the state rule, and a thorough sifting of the opinion fails to discover even a shard of evidence suggesting that the Court did not consider federal standards controlling.

Breed v. Jones, 421 U. S. 519 (1975), resolves any doubt that federal standards determine when jeopardy attaches. In *Breed,* a unanimous Court ruled that a juvenile may not be tried as an adult for violation of a criminal statute when the alleged violation has previously been the basis for a juvenile court's adjudicatory determination of delinquency. The state contended that jeopardy had not attached during the juvenile court proceedings. 421 U. S. at 527. Despite a statute authorizing transfer and trial in the adult division after an adjudication of delinquency—a state rule that jeopardy did not attach in juvenile court—

the Supreme Court applied federal standards in deciding whether and when jeopardy attached, 421 U. S. at 528-31.[16]

Montana correctly urges that *Breed v. Jones* did not "baldly assert that a state cannot determine at what point a trial commences," and argues that no constitutional violation occurred here because under the Montana statute appellants were "tried but one time." Brief for Appellees at 7. But the circularity of the argument is palpable, and the reliance on *Breed* transmutes literal facts into constitutional finding. Montana neglects to point out that *Breed* also rejected—on federal constitutional grounds—the state law doctrine that the adult division trial merely "continued" the juvenile jeopardy. 421 U. S. at 532-35. If the constitutional protection against double trials as well as double punishments[17] is not to be circumvented, federal law must be authoritative in defining when the first trial begins as well as when it ends, *i. e.*, when the accused is first put

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16 There is an indication in the Court of Appeals opinion that the state may have conceded that jeopardy attached during the juvenile proceedings, see Jones v. Breed, 497 F. 2d 1160, 1166 (9th Cir. 1974), vacated and remanded, 421 U. S. 519 (1975), but it is clear that in the Supreme Court and in the federal district court, the state argued that jeopardy did not attach during the juvenile proceedings and, in the alternative, that the second trial did not constitute a second jeopardy but a continuation of the first proceedings, see Breed v. Jones, 421 U. S. 519, 532 (1975); Jones v. Breed, 343 F. Supp. 690, 692 (1972).

17 Although Ex parte Lange, 85 U. S. (18 Wall.) 163, 172 (1873), indicated in dictum that "[i]t is the punishment that would legally follow the second conviction which is the real danger guarded against by the constitution," it has been firmly established ever since United States v. Ball, 163 U. S. 662, 669 (1896), that the "prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."

in jeopardy as well as when prior proceedings amount to former jeopardy. *See Breed v. Jones,* 421 U. S. 519, 534 (1975) ("the fact that the proceedings against respondent had not 'run their full course,' . . . within the contemplation of the California Welfare and Institutions Code . . . does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial"); *Price v. Georgia,* 398 U. S 323 (1969) (state may not employ continuing jeopardy theory to abrogate constitutional rule that acquittal ends first jeopardy).

Illinois v. Somerville and *Breed v. Jones* leave little room for argument, although the cases do not contain unequivocal language specifying federal rules of decision in attachment of jeopardy cases. Montana thus claims that a distinguishable state decision,[18] as "the sole case on point," recognizes state responsibility for defining the attachment of jeopardy. To the contrary, our researches reveal that the three Courts of Appeals that have considered the question have held that the task of defining attachment of jeopardy is a federal constitutional task. In *United States ex rel. Somerville v. Illinois,* 447 F. 2d 733, 735 (7th Cir. 1971), *rev'd on other grounds,* 410 U. S. 458 (1973), the

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18 State v. Padilla, 483 P. 2d 549, 533 (Ariz. 1971), cert. denied, 404 U. S. 1049 (1972), did hold that Benton "did not define what constituted jeopardy and we believe the States are still allowed a certain degree of discretion," in adopting an attachment of jeopardy rule similar to Montana's. The reasoning in Padilla, however, is conclusory and the case itself was decided before United States v. Jorn, Illinois v. Somerville and Breed v. Jones. Moreover, because the Arizona Supreme Court in Padilla held that the mistrial had been justified because a juror was "irrevocably committed" to leave the jurisdiction, see 483 P. 2d at 553-54, we doubt that the case's attachment of jeopardy rule can be considered as anything more than an alternative holding.

Seventh Circuit was presented with an argument identical to that made here, and ruled that federal, not state, law "is controlling on the issue as to when jeopardy attaches." Similarly, the Court of Appeals for the Third Circuit applied the federal rule to a state law case in *United States ex rel. Gibson v. Ziegele,* 479 F. 2d 773, 776 (3d Cir. 1973), *cert. denied,* 414 U. S. 1008 (1973). Finally, in *Smith v. Mississippi,* 478 F. 2d 88, 93 (5th Cir.) *cert. denied,* 414 U. S. 1113 (1973), the Fifth Circuit analyzed the double jeopardy claim of a state prisoner as follows:

> "the [state's] contention that petitioner was not 'put to trial' or was in no way prejudiced by the dismissal of the proceedings before testimony was presented has been decided adversely to it by the Supreme Court in *Downum . . . and Somerville. . . .* In both cases the Supreme Court held that jeopardy attached when the first jury was selected and sworn. The mere introduction of evidence has no spontaneous effect on a defendant which can be said to automatically charge him with an appreciable degree of insecurity once he had made the preparations for trial and selected those of his peers who will determine his fate."

Montana debates the comparative efficacy of the federal rule versus its own rule, relying on the belief of the Montana Supreme Court that there is "no substantial difference between the two rules," *State v. Cunningham,* 535 P. 2d 186, 189 (Mont. 1975). One must, of course, concede that line drawing—an unavoidable incident of judicial decision—"cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little," *Duncan v. Louisiana,* 391 U. S. 145, 161 (1968). But to make the very difficulty of constitutional decisionmaking

a reason to disregard authoritative Supreme Court precedent is not a proposition to be considered. *See, e. g., Baldwin v. New York,* 399 U. S. 66, 73-74 (1970) (state may not employ its own felony/misdemeanor classification, rather than federal potential sentence rule, to trigger jury trial guarantee despite similar results of the rules.)

Moreover, we question the accuracy of the Montana Supreme Court's view that there is "no inherent merit in the federal rule over Montana's state law," *State v. Cunningham,* 535 P. 2d 186, 188 (Mont. 1975). *Cunningham* incorrectly proceeds on the assumption that the attachment of jeopardy rule is designed to prevent prosecutorial manipulation. 535 P. 2d at 188-89. But as the Montana Supreme Court recognized, the trial court's correct application of mistrial doctrine, *see* Part III *infra,* is the only effective safeguard against prosecutorial overreaching. 535 P. 2d at 188-89. The attachment of jeopardy rule addresses different concerns: (1) protecting the accused from the financial, physical and psychological enervation worked by repetitive prosecutions;[19] and (2) preserving the accused's "valued right to have his trial completed by a particular tribunal, . . . *independent of the threat of bad-faith con-*

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19 The classic quotation is from Mr. Justice Black's opinion for the Court in Green v. United States, 355 U. S. 184, 187-88 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

duct by judge or prosecutor."[20] We decline to substitute a contradictory state rule for the Supreme Court's judgment that these concerns reach constitutional critical mass when the jury is impaneled and sworn.[21] And if preventing misconduct were the main purpose of the rule, a concern for prophylaxis would favor the federal formulation—it cannot be denied that the federal rule, which provides for earlier attachment, lessens the potential for misfeasance.

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20 United States v. Jorn, 400 U. S. 470, 484-85 (1971); accord, United States v. See, 505 F. 2d 845, 851 (9th Cir. 1974), cert. denied, 420 U. S. 992 (1975).

21 E. g., Serfass v. United States, 420 U. S. 377, 390-91 ("the constitutional policies underpinning the Fifth Amendment's guarantee are not implicated before that point in the proceedings at which jeopardy attaches. . . . This is by no means a mere technicality, nor is it a 'rigid, mechanical' rule. It is, of course, like most legal rules, an attempt to impart content to an abstraction.")

The Montana statute is nearly a verbatim adoption of the Model Penal Code provision governing improper termination of trial. See Model Penal Code § 1.08 (P. O. D. 1962). In the only ALI commentary on § 1.08, an earlier tentative draft noted the difference between the rule that jeopardy attaches in a jury trial when the jury is sworn, and the rule that jeopardy attaches in a bench trial when the first witness is sworn, but the reporter could find "no reason" for the difference. Model Penal Code, Comment to § 1.09, at 53 (T. D. No. 5, 1956). The reporter, we believe, failed to recall that the Supreme Court has consistently recognized a major purpose of the double jeopardy clause as the protection of a defendant's "valued right to have his trial completed by a particular tribunal," Wade v. Hunter, 336 U. S. 684, 689 (1949); accord, United States v. Dinitz, 44 U. S. L. W. 4309, 4311 (U. S. March 3, 1976); Illinois v. Somerville, 410 U. S. 458, 469-71 (1973); United States v. Jorn, 400 U. S. 470, 484-85 (1971); Downum v. United States, 372 U. S. 734, 736 (1963). When one sees that the two attachment of jeopardy rules are necessary if this "valued right" is to be protected, the reason for the distinction seems plain.

III. RETRIAL AFTER MISTRIAL

Preconstitutional courts in America and England offered protection against double jeopardy only to defendants who had been pursued to the point of a final judgment or verdict. Whether the framers envisioned the double jeopardy clause as affording a broader protection against reprosecution after prematurely terminated trials is not disclosed by available historical evidence.[22] Thus it is not surprising that in *United States v. Perez*, 22 U. S. (9 Wheat.) 579 (1824), Mr. Justice Story treated the first mistrial case to reach the Supreme Court as presenting questions of the general law of the United States rather than constitutional issues. *Perez* held that retrial was not barred when a court discharges a jury unable to agree on a verdict. In terms that later became the touchstone for constitutional analysis, Justice Story declared that "the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration there is manifest necessity for the act, or the ends of public justice would otherwise be defeated," and found "the security which the public have for the faithful, sound and conscientious exercise of this discretion," to rest "upon the responsibility of the judges, under the oaths of office." 22 U. S. (9 Wheat.) at 580.

A declaration of mistrial anticipates reprosecution, but as early as *Simmons v. United States*, 142 U. S. 148 (1891),

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22 See United States v. Wilson, 420 U. S. 332, 342 (1975). Note, Double Jeopardy: The Reprosecution Problem, 77 Harv. L. Rev. 1272, 1273 & nn. 11-16 (1964).

an erroneously declared mistrial was viewed as creating a potential double jeopardy problem. *Simmons* and *Logan v. United States*, 144 U. S. 263 (1892), attached constitutional significance to *Perez*' delphic concepts of "manifest necessity" and "the ends of public justice," which are now firmly established as constitutional standards of review of mistrial cases, *see, e. g., United States v. Dinitz*, 44 U. S. L. W. 4309, 4311 (U. S. March 3, 1976); *Illinois v. Somerville*, 410 U. S. 458, 461 (1973). Since appellants were put in jeopardy at their first trial, *see* Part II *supra*, the remaining question on appeal is whether, under the *Perez* standards, the mistrial was declared in circumstances that permit reprosecution.

A. *The Legacy of Perez*

The rationale behind allowing retrial following mistrial rulings that meet the *Perez* standards—for any retrial exposes a defendant to double trials and also substitutes a new jury for that originally chosen—was outlined in *Wade v. Hunter*, 336 U. S. 684, 688-89 (1949):

> "The double jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibition is aimed."

In administering the *Perez* test, the Court has been reluctant to resort to mechanical rules to resolve the conflict between a defendant's Fifth Amendment rights and

society's interest in full enforcement of the criminal law. Nevertheless, ever since Justice Story cautioned that the power to declare a mistrial should be employed only "under urgent circumstances, and for very plain and obvious causes," 22 U. S. (9 Wheat.) at 580, one uniform requirement has been imposed on all mistrial cases. That requirement and the reason for it were explained in *United States v. Jorn*, 400 U. S. 470, 485 (1971):

> "If [the] right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. . . . [T]he *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."

Accord, United States v. Dinitz, 44 U. S. L. W. 4309, 4311-12 (U. S. March 9, 1976); *Illinois v. Somerville*, 410 U. S. 458, 462-63 (1973).

Applying this principle to the instant case, we hold that retrial on Count I (grand larceny) of the original information was prohibited by the double jeopardy clause. Unlike Count II (obtaining money and property by false pretenses), Count I was sufficient to state an offense. Its dismissal necessarily denied appellants the chance to take the grand larceny charge "to the first jury and, perhaps, end the dispute then and there with an acquittal," *United States v. Jorn*, 400 U. S. 470, 484 (1971). Yet no reason—

other than the state's convenience in litigating the case as a unit—appears to have prompted the mistrial declaration. Certainly the "public's interest in fair trials designed to end in just judgments," *Wade v. Hunter,* 336 U. S. 684, 689 (1949), could have been adequately served by completing the trial on Count I. In these circumstances, the mistrial and retrial on Count I amounted to an archetypal double jeopardy violation.

B. *Mistrials and State Procedural Rules*

Count II (obtaining money and property by false pretenses) of the original information presents a different issue. The trial court dismissed Count II *sua sponte* after denying the state's motion to amend the information in order to correct a typographical error. Unamended, Count II failed to state an offense, but unfortunately that circumstance is not dispositive in determining the constitutionality of retrial. It has long been clear, for example, that an acquittal on a defective indictment is nonetheless a bar to subsequent prosecution for the same offense.[23] Furthermore, if the state could stultify its own trial process by claiming that a prosecution on a defective information—however concluded—did not constitute former jeopardy, the Fifth Amendment's protection against persecution by prosecution would be undermined.

23 "But although the indictment was fatally defective, yet, if the court had jurisdicion of the cause and of the party, its judgment is not void, but only voidable by writ of error. . . . If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot." United States v. Ball, 163 U. S. 662, 669-70 (1896). As the Court recognized in Illinois v. Somerville, 410 U. S. 458, 466-68 (1973), this does not mean that a mistrial can never be justified by a defective indictment because of the possibility of a jeopardy-ending acquittal. It does mean, however, that when a defective indictment can be cured by amendment without a mistrial declaration, the first jury should not be jettisoned merely to serve the state's convenience.

The Count II mistrial does not conveniently appear under the rubrics of the classic mistrial cases—hung jury, juror disqualification, tactical exigencies of a wartime court-martial, or prolonged illness or incapacity of judge, counsel or witnesses.[24] We are aware, of course, that the Supreme Court has protested the development of *per se* rules to govern mistrials, *see, e. g., Wade v. Hunter,* 336 U. S. 684, 691 (1949) (criticizing Ninth Circuit rule that unavailability of healthy witness can never justify mistrial), as inconsistent with *Perez'* emphasis on flexibility, *see Illinois v. Somerville,* 410 U. S. 458, 467 (1973). On the other hand, an inevitably *ad hoc* balancing test would threaten to transform *Perez* from an exception into an analytical formulation "whose escape hatch is larger than the compartment from which it offers egress."[25] A more promising approach, we think, is to compare the instant case with the Supreme Court's decisions in *Downum, Jorn* and *Somerville.*

As the first Supreme Court case to hold that the double jeopardy clause prevented reprosecution after a mistrial,

24 See, e. g., Logan v. United States, 144 U. S. 263 (1892) (hung jury); Thompson v. United States, 155 U. S. 271 (1894) (juror disqualified because member of grand jury); Simmons v. United States, 142 U. S. 148 (1891) (outside influence brought to bear on jury); Wade v. Hunter, 336 U. S. 684 (1949) (court-martial); United States v. Moon, 491 F. 2d 1047, 1048 (5th Cir. 1974) (illness of defense counsel); United States ex rel. Gibson v. Ziegele, 479 F. 2d 773 (3d Cir.), cert. denied, 414 U. S. 1008 (1973) (illness of key witness occurring after trial had begun.)

25 Cf. Bickel, The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 43 n. 17 (1961).

Downum v. United States, 372 U. S. 734 (1963), looms rather large on the constitutional landscape. When the government's key witness on two of six counts of passing checks stolen from the mail failed to appear the United States asked that the jury be discharged. The defendant countered by requesting that the two counts be dismissed for want of prosecution and that trial continue on the other four. There was no suggestion that the witness' non-appearance was caused by anything other than the marshal's inability to serve him with a subpoena. The prosecution knew of this difficulty, but answered ready, apparently assuming that service had been made. The trial court granted the government's motion. In holding that retrial on any of the six counts violated the double jeopardy clause, the *Downum* Court established two propositions. First, *Downum's* disposition of the two affected counts means that the fact that the government's unpreparedness is due to "excusable oversight," 372 U. S. at 742 (Clark, J., dissenting), rather than a plan to capture unfair tactical advantage, is not by itself sufficient to support a mistrial declaration. Second, *Downum's* disposition of the four other counts shows that the government may not frustrate a defendant's right to take the case to the jury by claiming possible adverse collateral estoppel effects if a multiple-count indictment is separated for trial. *Downum* is thus fully congruent with our own holding on Count I (grand larceny). *Downum* also tells us that Montana may not justify retrial on Count II (obtaining money and property by false pretenses) by claiming that the prosecutorial error was inadvertent or by asking for unitary adjudication of both counts.

United States v. Jorn, 400 U. S. 470 (1971), teaches an equally significant lesson. In *Jorn,* the trial court in a

tax fraud case declared a mistrial to safeguard prosecution witnesses' privilege against self-incrimination. The Supreme Court concluded that the trial judge had been overassiduous in his attempt to protect witnesses who fully understood their rights, and held that retrial on all counts was prohibited. *Jorn* shows that a defendant's trial position need not be impaired in order for retrial to be prohibited: the government was the only party whose proof might have been weakened by the trial court's action. In the present case, *Jorn* means that deprivation of the "valued right" to take the case to the jury is enough in itself to bar retrial unless the mistrial declaration was actually necessary to protect other important interests.

In *Illinois v. Somerville,* 410 U. S. 458 (1973), the trial court granted the state's motion for a mistrial after it was discovered that the indictment failed to allege a necessary element of the offense charged. Illinois law prevented amendment of the information. The Supreme Court held that where a state law "procedural defect might or would preclude the public from either obtaining an impartial verdict or keeping a verdict of conviction if its evidence persuaded the jury," a mistrial is constitutionally available when "the mistrial [is], under [state] law, the only way in which a defect in the indictment could be corrected." 410 U. S. at 468-69.

Somerville's explanation of its holding is not entirely satisfactory. The state rule was designed to "implement the State's policy of preserving the [state-created] right of each defendant to insist that a criminal prosecution against him be commenced by action of the grand jury," 410 U. S. at 468, and it was that policy which *Somerville* respected. It is hard to see, however, how a state's inter-

est in protecting its citizens' state procedural rights should be sufficient to deprive those same citizens of what otherwise would be a federal constitutional right not to be placed twice in jeopardy. Indeed, it would seem that the more Procrustean a state rule is, the more likely it will be—under *Somerville*—sufficient cause for subjecting defendants to two trials and two juries.

Somerville's anomalies need not detain us, however, for the facts of this case point to a result that is fully consistent with *Downum, Jorn* and *Somerville.* The applicable Montana statute, § 95-1505, Rev. Code of Mont. 1947 (Smith ed. 1969), provides:

> "(a) A charge may be amended in matters of substance at any time before the defendant pleads, without leave of court.
>
> (b) The court may permit any charge to be amended as to form at any time before verdict or finding if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.
>
> (c) No charge shall be dismissed because of a formal defect which does not tend to prejudice a substantial right of the defendant."

One can hardly imagine a more "formal" matter than the correction of a glaring typographical error, and surely no "rights of the defendant" would have been undercut by the requested alteration. No state policy of ensuring that all criminal charges are initiated by indictment by the grand jury is involved here, for an information can be filed at the discretion of the prosecutor. Finally, although the standard by which a trial judge's action must be measured is ultimately federal, our researches indicate that Montana case law fully comports with our conclusion that the trial

court's failure to grant the motion to amend was an abuse of discretion,[26] and that the *sua sponte* declaration of mistrial on Count II was made in circumstances that, under the *Perez* doctrine, do not permit retrial.

REVERSED and REMANDED.

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26 See, e. g., State v. Terry, 250 P. 612 (Mont. 1926) (amendment at close of state's case to change date of unlawful liquor possession from April 10, 1925 to April 24, 1925 was proper); State v. Polich, 226 P. 519, 519-20 (Mont. 1924) (clerical error in an information which made date read "19122" instead of "1922" was "matter of form" under statute governing sufficiency of charges); State v. Beeskove, 85 P. 376, 377 (Mont. 1906) (while time and place must "be so alleged as to enable a person of common understanding to know what is intended by the charge," time need not be alleged precisely unless it is element of offense); State v. Oliver, 50 P. 1018 (Mont. 1897) (amendment at close of state's evidence to change name of alleged victim of robbery is permitted.)

The current statute that controls amendment of criminal charges, § 95-1505, was enacted in 1967, see ch. 196, § 1, Laws of Montana 1967, repealing § 94-6207, Rev. Code of Mont. 1947. Former versions of the statute also made use of the distinction between form and substance, permitting amendments as to both at any time before plea, but restricting amendments after plea to "matters of form" only, in the discretion of the trial judge. See Gransberry v. State, 423 P. 2d 583 (Mont. 1967) (per curiam). The difference between form and substance has never been pellucid, but the cases indicate that in Montana a change of substance is one which elevates the charged offense from a misdemeanor to a felony, compare Gransberry v. State, 423 P. 2d 853 (Mont. 1967), and State v. Fisher, 254 P. 872 (Mont. 1927), with State v. Tritz, 522 P. 2d 603 (Mont. 1974), and State v. Knight, 387 P. 2d 22 (Mont. 1963), or which alters the type of crime charged so that a different offense, within the contemplation of the "same evidence rule," is alleged, see State v. Tropf, 530 P. 2d 1158 (Mont. 1975) (trial court correctly refused to permit amendment changing offense from possession to sale of drugs). On the other hand, where the amendment changes the charge from "first degree burglary" (which requires the state to prove the burglary occurred at night) to "burglary" (leaving the question of degree to the jury), it is a change of form only. See State v. Stewart, 507 P. 2d 1050, 1053 (Mont. 1973) (construing present statute); State v. Lu Sing, 85 P. 521, 522-23 (1906) (correction of misspelling is "matter of form" that does not render indictment insufficient).

APPENDIX B

Clancy CUNNINGHAM, Petitioner,

vs.

The DISTRICT COURT OF the THIRTEENTH JUDICIAL DISTRICT OF the STATE OF MONTANA et al., Respondents.

L. R. BRETZ, Petitioner,

vs.

Roger CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and John Moe, as Sheriff of Missoula County, Montana, Respondents.

Merrel CLINE, Relator,

vs.

The STATE OF MONTANA and Roger Crist, Warden, Montana State Penitentiary, Respondents.

Nos. CV-75-112-BLG—CV-75-114-BLG.

United States District Court,
D. Montana,
Billings, Division.

Dec. 31, 1975.

Petitions on behalf of three petitioners were filed for writs of habeas corpus. The cases were consolidated. The District Court, Battin, J., held that Montana statute which provides that jeopardy attaches in a criminal trial after the first witness is sworn does not violate double jeopardy provisions of Fifth Amendment to United States Constitution or the Montana Constitution; and that even assuming that jeopardy attaches in state proceedings when jury is sworn, doctrine of manifest necessity required that further trial be held as to defendants, despite error as to one count in information as to date which led to dismissal and refiling of information, since the flaw pertaining to the date was nothing more than a typographical defect which should not bar the continuation and completion of the trial.

Petitions denied.

1. *Constitutional Law*—260

Double jeopardy provision contained in Fifth Amendment to United States Constitution applies to the states. U. S. C. A. Const. Amend 5.

2. *Constitutional Law*—267

Due process clause of Fourteenth Amendment imposes the Sixth Amendment trial by jury upon the states. U. S. C. A. Const. Amends. 6, 14.

3. *Criminal Law*—146

Montana statute which provides that jeopardy attaches in a criminal trial after the first witness is sworn does not violate double jeopardy provisions of Fifth Amendment to United States Constitution nor the Montana Constitution. U. S. C. A. Const. Amend. 5; R. C. M. 1947, § 95-1711; Const. Mont. 1972, art. 2, § 25.

4. *Criminal Law*—170

Even assuming that jeopardy attaches in state proceedings when jury is sworn, doctrine of manifest necessity required that further trial be held as to defendants,

despite error as to one count in information as to date which led to dismissal and refiling of information, since the flaw pertaining to the date was nothing more than a typographical defect which should not bar the continuation and completion of the trial. U. S. C. A. Const. Amend. 5; R. C. M. 1947, § 95-1711; Const. Mont. 1972, art. 2, § 25.

Moses, Kampfe, Tolliver & Wright, Billings, Mont., for Clancy Cunningham.

Charles F. Moses, Moses, Kampfe, Tolliver & Wright, Billings, Mont., for L. R. Bretz.

W. William Leaphart, The Leaphart Law Firm, Helena, Mont., for relator Merrel Cline.

Richard Dzivi, Special Pros., Robert L. Woodahl, Atty. Gen. for the State of Montana, Helena, Mont., for respondents.

MEMORANDUM AND ORDER

BATTIN, District Judge.

The above-named petitioners have individually submitted petitions for writs of habeas corpus. Due to the similarity of issues, the cases were consolidated.

BACKGROUND FACTS.

Petitioner Cunningham

Petitioner was charged in Information No. 9017, filed on August 24, 1973, in Yellowstone County, with first degree assault. On March 21, 1974, a jury was impaneled

and sworn, and the omnibus instruction was read. Prior to the swearing of any witness, the State was granted a motion to dismiss due to the unavailability of the key witness. A second Information alleging third degree assault was filed on May 20, 1974. On August 16, 1974, the Yellowstone County District Court granted petitioner's motion to quash the Information because of double jeopardy. On May 2, 1975, the Supreme Court of Montana reversed the District Court's order, holding that further prosecution was not barred by double jeopardy provisions of the United States and Montana Constitutions. *State of Montana v. Cunningham, Mont.*, 535 P. 2d 186 (1975). The Supreme Court denied petitioner's petition for rehearing on May 20, 1975. The matter was set for trial on November 11, 1975.

Petitioners Bretz and Cline

Information No. 3921 was filed on October 3, 1974, in Lewis and Clark County, charging petitioners with the commission of nine felonies. On March 13, 1975, a jury was impaneled and sworn, but no witnesses were sworn. The trial court then granted a motion by petitioners to dismiss one count. The State filed and the District Court granted a motion to dismiss the remaining counts on April 4, 1975, before any witnesses were sworn; a second Information, No. 3963, alleging the commission of two felonies by petitioners, was filed on the same day. Petitioners' motion to dismiss on the grounds of double jeopardy was filed on April 25, 1975, and the District Court denied it on May 1, 1975. Petitioner Bretz filed a petition for habeas corpus with the Supreme Court of Montana, alleging double jeopardy. This was denied by that court on July 23, 1975.

Bretz v. Sheriff, Mont., 539 P. 2d 1191 (1975). On September 2, 1975, the Supreme Court denied a rehearing. A trial commenced in the District Court of the First Judicial District on June 16, 1975, and on July 2, 1975 petitioners were found guilty of obtaining money by false pretenses—the same count that had been dismissed as the result of petitioners' motion.

ISSUES.

1. Is Section 95-1711 of the Revised Codes of Montana, 1947, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution and the Montana Constitution?

2. Assuming that the United States Supreme Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of "manifest necessity" require that a further trial be held as to petitioners Bretz and Cline?

DISCUSSION.

A. *Application of Fifth Amendment to the States.*

[1] There is no doubt that the double jeopardy prohibition contained in the Fifth Amendment to the United States Constitution applies to the States. *Benton v. Maryland*, 395 U. S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). The Court in *Benton* stated:

> "In 1937, this Court decided the landmark case of *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288. Palko, although indicted for first-degree murder, had been convicted of murder in the second degree after a jury trial in a Connecticut state court.

> The State appealed and won a new trial. Palko argued that the Fourteenth Amendment incorporated, as against the States, the Fifth Amendment requirement that no person 'be subject for the same offense to be twice put in jeopardy of life or limb.' The Court disagreed. Federal double jeopardy standards were not applicable against the States. Only when a kind of jeopardy subjected a defendant to 'a hardship so acute and shocking that our polity will not endure it,' *id.* at 328, 58 S. Ct. [149], at 153, did the Fourteenth Amendment apply. The order for a new trial was affirmed. In subsequent appeals from state courts, the Court continued to apply this lesser *Palko* standard. See, *e. g., Brock v. North Carolina*, 344 U. S. 424, 73 S. Ct. 349, 97 L. Ed. 456 (1953).
>
> "Recently, however, this Court has 'increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law.' *Washington v. Texas*, 388 U. S. 14, 18, 87 S. Ct. 1920, 1922, 18 L. Ed. 2d 1019 (1967). In an increasing number of cases, the Court 'has rejected the notion that the Fourteenth Amendment applies to the States only a "watered-down, subjective version of the individual guarantees of the Bill of Rights. . . ."' *Malloy v. Hogan*, 378 U. S. 1, 10-11, 84 S. Ct. 1489, 1495, 12 L. Ed. 2d 653 (1964) Only last Term we found that the right to trial by jury in criminal cases was 'fundamental to the American scheme of justice,' *Duncan v. Louisiana*, 391 U. S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491 (1968), and held that the Sixth Amendment right to a jury trial was applicable to the States through the Fourteenth Amendment. For the same reasons, we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled." (Footnotes omitted.) *Benton, supra*, at 793-794, 89 S. Ct. at 2062.

But the Court has been careful to distinguish between *substantive rights* and *procedures*. A review of the Court's actions concerning the right to trial by jury clearly establishes that the Court has determined that as long as the substance of the right is maintained, then the procedure by which the result is reached is wholly within the discretion of the State. See 47 Am. Jur. 2d 640, 641.

[2] As held in *Duncan, supra,* the due process clause of the Fourteenth Amendment imposes the Sixth Amendment trial by jury right upon the States. Rule 23(b) of the Federal Rules of Criminal Procedure, established to protect these rights, requires that a jury shall consist of twelve persons and that a verdict shall be unanimous. Despite this federal rule, several States have differing provisions.

Oregon and Louisiana, for example, have determined that notwithstanding the federal requirement of unanimity, a conviction could be attained on a less than unanimous jury vote. The Supreme Court has held that the States have the right and power to set such procedures and that the federal rule was strictly for use in federal trials. *Apodaca v. Oregon,* 406 U. S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); *Johnson v. Louisiana,* 406 U. S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972).

Similarly, the Supreme Court has determined that a State can provide for a jury trial of less than twelve persons—again notwithstanding federal rules to the contrary. *Williams v. Florida,* 399 U. S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

Clearly, the Supreme Court has not mandated that States accept the federal procedure as long as the State

procedure preserves the constitutional objective. Montana's procedural rule does not present a "watered-down version" of the constitutional right. The defendants' substantive rights receive no less protection under the Montana statute than under federal procedures, for, practically speaking, the swearing of the jury and the swearing of the first witness occur nearly at the same point in time. Since the substance of the right has been clearly preserved, then the object of the constitutional provision guaranteeing that the defendant shall not be placed in jeopardy twice has been met.

As the Montana Supreme Court stated in *Cunningham, supra,* 535 P. 2d at 189:

> "We find no substantial difference between the two rules. Montana policy as enunciated by its legislature is that the trial does not start until the first witness is sworn. Sound policy reasons exist for this rule, principally that the jury as the trier of the facts has nothing to consider until the first witness is called and sworn. This appears entirely consistent with the constitutional standard that jeopardy does not attach until the defendant has been put to trial before the trier of the facts. *Serfass v. United States* (1975), supra [420 U. S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265]."

The Court, noting that they could perceive no inherent merit in the federal rule over Montana's state law, further stated:

> " . . . It has been said that the federal rule is designed to prevent prosecutorial manipulation. *Illinois v. Somerville* [88 Ill. App. 2d 212, 232 N. E. 2d 115], supra. It has further been said that the federal rule guarantees the defendant his valued right to have his trial completed before the tribunal and jury selected for

his case. *Wade v. Hunter* (1949), 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 974; *United States v. Jorn*, supra [400 U. S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971)].

"We fail to see in what manner the federal rule protects against these abuses to a greater extent than Montana law. Prosecutorial manipulation can be effected as readily under one rule as under the other. If bent on manipulation, a federal prosecutor can move to dismiss after the jury is selected but before it is sworn, as readily as a state prosecutor can move to dismiss after the jury is sworn but before the first witness is called. In either case, the real protection against prosecutorial manipulation is the discretion of the trial judge in granting or denying dismissal. Here, for example, the judge could have, but did not, dismiss with prejudice.

"Nor do we see any greater protection in the federal rule as far as securing to defendant the right to have his trial completed before the court and jury selected to try his case. Montana adheres to this principle also. It all depends on when the trial is considered to have commenced—whether on selection and swearing of the jury as in the federal courts, or on swearing the first witness as in Montana state courts." *Cunningham, supra,* at 188.

The United States Supreme Court has never rendered any blanket holding to the effect that a State could not decide at what point jeopardy has attached. The petitioners have cited *Breed v. Jones,* 421 U. S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975), which they contend holds that the States cannot decide for themselves when Fifth Amendment jeopardy attaches. This is clearly not the holding of that case. The sole issue in that case was whether a juvenile court adjudication constituted a trial, thereby establishing double jeopardy on a subsequent adult trial for

the same offense. The Court, addressing itself primarily to the unique nature of juvenile proceedings and the legal rights of juveniles, concluded that such a proceeding was, in fact, like a trial and jeopardy attached. Nowhere in the opinion does the Court baldly assert that a State cannot determine at what point a trial commences. Nor does the Court ever attempt to impose any federal procedural rule upon the California Juvenile Court. The sole concern in *Breed,* as it is in the instant case, is not whether federal procedures were followed, but whether federally guaranteed rights were violated.

The Arizona Supreme Court, faced with the same conflict between federal and state rules, upheld the constitutionality of their own state rule. The Court concluded:

"The United States Supreme Court has held that the double jeopardy clause of the Fifth Amendment to the United States Constitution is applicable to the States. [citations omitted.] They did not define what constituted jeopardy and we believe the States are still allowed a certain degree of discretion as to what amounts to jeopardy. We hold, as a matter of law, that jeopardy had not attached in this case." *State v. Padilla,* 107 Ariz. 134, 483 P. 2d 549, 553 (1971); cert. den. 404 U. S. 1049, 92 S. Ct. 718, 30 L. Ed. 2d 740 (1971).

I agree with that Court's holding.

[3] Therefore, I conclude that the statute does not violate the United States Constitution nor the Montana Constitution, Article II, Section 25. *State of Montana v. Cunningham, supra,* 535 P. 2d 186.

B. *Manifest Necessity.*

[4] Assuming that jeopardy attaches in state proceedings when the jury is sworn, the doctrine of manifest

necessity would nevertheless require that a further trial be held as to petitioners Bretz and Cline.

The State alleges in its brief and oral argument that petitioners were well aware of a typographical error as to one count in the information—specifically, a date of 1973 which had inadvertently been typed "1974". The State continues that the petitioners, knowing of this error, waited until the jury was sworn and then moved for dismissal. The State, considering that it was the most important of the nine counts, dismissed the remaining eight counts and refiled the information charging two counts—alternative pleading of a single offense.

The petitioners contend that their motion to dismiss was simply to require the prosecution to conform the evidence to the pleadings and that there was no reliance by the defendants on any defect in the pleadings.

Regardless of how the parties attempt to characterize the factual situation, it appears that the flaw was nothing more than a typographical defect, which should not bar the continuation and completion of the trial.

The United States Supreme Court has been confronted with similar situations. In concluding that jeopardy had not attached, the Court in *Illinois v. Somerville,* 410 U. S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973), stated:

> " . . . The interest of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal

> or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest. This consideration, whether termed the 'ends of public justice,' [citation omitted] or, more precisely, 'the public's interest in fair trials designed to end in just judgments,' [citation omitted] has not been disregarded by this Court." *Somerville, supra,* at 463, 93 S. Ct. at 1070.

To prevent the refiling of an information and subsequent trial as the result of such a typographical defect certainly precludes the public's interest in a fair trial designed to end in a just judgment.

As the Ninth Circuit recently stated:

> "To adopt appellee's argument would require a mechanical formula to determine when jeopardy attaches. This approach well could undermine the policies and purposes of the constitutional safeguard. 'Whether jeopardy attaches is based on flexible policy considerations rather than hard and fast rules. . . .' *United States v. Brown,* 481 F. 2d 1035, 1040 (8 Cir. 1973); *see Illinois v. Somerville,* 410 U. S. 458, 467, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973); *United States v. Jorn, supra,* at 480, 91 S. Ct. 547." *U. S. v. Choate,* 527 F. 2d 748, 1975.

Therefore, it is ordered that the petitions for writs of habeas corpus are denied.

APPENDIX C

In The United States Court of Appeals
For The Ninth Circuit

No. 76-1572

L. R. BRETZ,
Petitioner-Appellant,

vs.

ROGER CRIST, etc., et al.,
Respondent-Appellee.

No. 76-1169

MERREL CLINE,
Petitioner-Appellant,

vs.

THE STATE OF MONTANA, etc., et al.,
Respondent-Appellee.

NOTICE OF APPEAL

Notice is hereby given that the respondent, State of Montana, above named, hereby appeals to the United States Supreme Court from the Order entered in this proceeding on the 19th day of November, 1976.

DATED this 13th day of December, 1976.

STATE OF MONTANA
Office of the Attorney General

By: /s/ Albert W. Meloling
Chief Prosecutor

Filed December 15, 1976 in the above-entitled court.

APPENDIX D

95-1711. *Effect of former prosecution and multiple prosecutions.* (1) Definitions of terms.

(a) The term "same transaction" includes conduct consisting of:

(i) a series of acts or omissions motivated by a purpose to accomplish a criminal objective, and necessary or incidental to the accomplishment of that objective; or

(ii) a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

(b) An offense is an "included offense" when:

(i) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(ii) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(iii) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

(2) Method of prosecution when conduct constitutes more than one offense. When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses;

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, and unless the law provides that the specific periods of such conduct constitute separate offenses.

(3) When prosecution barred by former prosecution. Provided the offenses, if more than one, were known to the attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were consummated prior to the original charge, and provided the jurisdiction and venue of the several offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense than the offense charged which is subsequently set aside is

an acquittal of the greater inclusive offense that was charged.

(b) The former prosecution was terminated, after a complaint had been filed on a misdemeanor charge, after an information had been filed or an indictment found on a felony charge, by a final order of judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in:

(i) a judgment of conviction which has not been reversed or vacated; or

(ii) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant; or

(iii) a plea of guilty accepted by the court, so long as failure to enter judgment was for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(i) the defendant consents to the termination or waives his right to object to the termination; or

(ii) the trial court, in the exercise of its discretion, finds that the termination is necessary because:

(A) it is physically impossible to proceed with the trial in conformity with law; or

(B) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(C) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state; or

(D) the jury is unable to agree upon a verdict; or

(E) false statements of a juror on voir dire prevent a fair trial.

(4) Former prosecution in another jurisdiction—when a bar. When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate and/or concurrent jurisdiction in this state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

(a) The first prosecution resulted in an acquittal or in a conviction as defined in subsection (3) and the subsequent prosecution is based on an offense arising out of the same transaction.

(b) The former prosecution was terminated, after the complaint has been filed on a misdemeanor charge, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated

and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

(5) Former prosecution before court lacking jurisdiction or when fraudulently procured by the defendant. A prosecution is not a bar within the meaning of subsections (3) and (4) under any of the following circumstances:

(a) the former prosecution was before a court which lacked jurisdiction over the defendant or the offense; or

(b) the former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpose of avoiding the sentence which might otherwise be imposed; or

(c) the former prosecution resulted in a judgment of conviction which was held invalid in any post-conviction hearing.

History: En. 95-1711 by Sec. 6, Ch. 513, L. 1973.

Multiple Offenses

Upon allegation of assault and battery, rape, kidnaping, and homicide, all arising from the same transaction, the prosecution is bound to prosecute them all at one time, in so far as possible, even though the court may be required to limit the number of verdicts the jury may return. State ex rel. McKenzie v. District Court, — M —, 525 P.2d 1211.